In interpleader actions the claimant is required by the rules to lodge with the Messenger of the Court a statement of the grounds upon which his claim is based, and the Messenger is required to forward such statement to the judgment creditor. This statement was not produced by respondent in the present case, and we cannot therefore be certain that it was alleged therein that one of the cattle bears the earmark of Madonela. I shall assume in respondent's favour that the statement does not contain this allegation. Nevertheless as respondent pointed out the cattle to the Messenger he must have noticed whether the one beast was earmarked, and he had the opportunity of ascertaining whether or not the mark was that of Madonela. He should therefore have been in a position to deny the evidence of the earmark. He has not done so. It seems to me therefore that the conclusion is inescapable that respondent was not in a position to do so. This Court would therefore not be justified in rejecting the evidence of claimant merely because it stands alone. This evidence together with the uncontradicted evidence of the *ngoma* transaction, rebuts the presumption of ownership which flows from possession of the cattle by the debtor.

In my opinion the cattle should have been declared not executable, but as my brothers Cornell and Mundell do not agree with me their judgment will of course be the judgment of the Court.

Cornell (Member) delivering the judgment of the Court:

The claimant in this matter relies on a contract of *ngoma* to discharge the heavy onus resting on him. *Ngoma* is a contract of loan under which the owner of stock places stock with another man whose duty it is to look after and account to the owner for such stock. The owner is, however, bound by custom to exercise the various acts of ownership, including inspection of the stock, earmarking of progeny, disposal of natural profits such as wool in the case of small stock, and allocating to the possessor, if he is satisfied, such portion as a reward as he deems fit, in order to reveal to the world that he and not the possessor is the owner.

In addition it is essential that when the loan is made independent persons are called to witness the loan and within these limits *ngoma* becomes a contract, capable of easy proof. It is at the same time a contract capable of easy misuse and misrepresentation, particularly as against third parties.

In this matter the claimant is supported by two independent persons, who while giving evidence of a *ngoma* do not link up that *ngoma* with the cattle in dispute. It is possible to say that the transaction to which they refer is an entirely different transaction and that, therefore, leaves claimant's evidence quite alone. The most that can be said for his evidence is that he earmarked one animal with what he claims is his father's earmark and that he fetched the original beast to be slaughtered. Those are the only acts of ownership which have been exercised during the existence of the alleged *ngoma*, a matter of seven years, and with these acts he seeks to rebut the strong presumption that the possessor is the owner. It is easy for the claimant to allege that a swallowtail—right ear—is Madonela's earmark and as earmarks are not registered it cannot be expected that such a statement can be easily rebutted by a third party. In fact any testimony as to an earmark given by a person other than the possessor of the earmark is primarily hearsay and obtains credence only by virtue of positive facts connected therewith. It is therefore more than difficult—nay almost impossible—for a third party to rebut such a statement unless his rebuttal is to the effect that the earmark referred to is non-existent. On the other hand the claimant is or should be able to produce other stock in his own possession bearing the same earmark to which he has testified, or some other testimony to support his meagre statements.

The judgment creditor has not given any testimony and to assume that because of that fact he is unable to rebut the claimant's evidence is perhaps going too far. He is in the position of an ordinary bystander in relation to the contract and the most he may be able to say is that he had seen the stock in the debtor's possession and the debtor exercising acts of ownership in regard to it. To require a judgment creditor to rebut meagre and inconclusive evidence is to place an onus on him which is not his. It is for the claimant to rebut the presumption of ownership and we are of the opinion that such rebuttal must be clear, substantial and conclusive before the judgment creditor can be asked to testify in rebuttal. The claimant in this matter had at his disposal other testimony which may have strengthened his case. He did not choose to place such testimony before the Court and is therefore not entitled to ask the Court to accept that, because he has given evidence, he has discharged the onus resting on him. It is his duty to prove substantially the existence of the contract on which he relies. This he has not done and the appeal is dismissed with costs.

Mundell (Member): I concur.

For Appellant: Mr. Knopf, Umtata.

For Respondent: Mr. Hughes, Umtata.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION.)
1948

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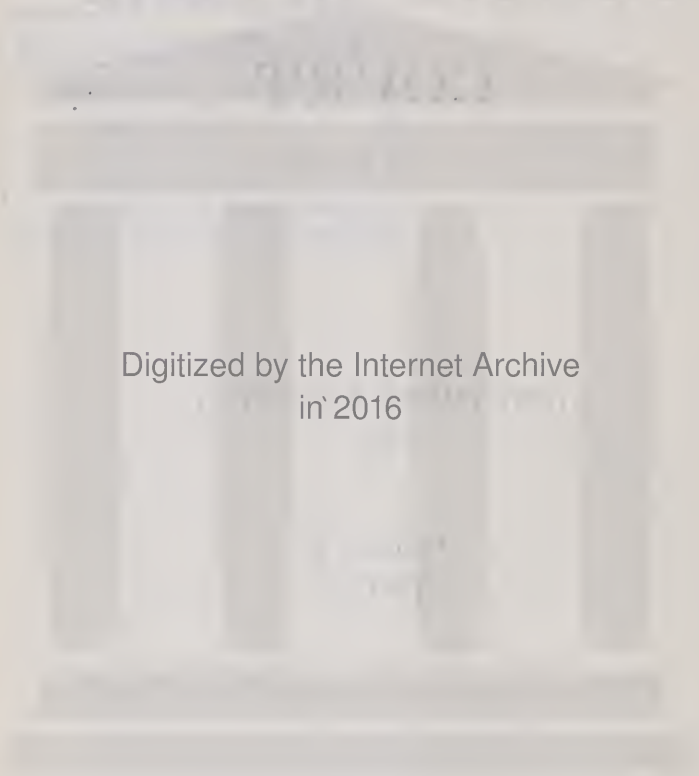

CASE No. 14.

TETIWE MGIJIMA *v.* ATTWELL MUSSOLINI.

KINGWILLIAMSTOWN: 14th July, 1948. Before Sleigh (President), Pike and de Souza, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Default Judgment—Application for recission—Defendant in default—Default not wilful nor acquiesced in judgment if attorney withdraws from case—Native Commissioner's Court—Plea—Rule 26 (*a*) *contemplates an answer why judgment should not be granted as prayed—Bare denial not sufficient—Good defence—Defence pleaded in error and in conflict with second defence no ground for holding that defendant has no defence.*

Appeal from the Native Commissioner's Court, Salt River.

Sleigh (President) delivering the judgment of the Court:

In an action for an order of ejectment against defendant from premises situate at No. 32 Hanover Street, Cape Town, plaintiff alleges (Par. 2) that he is the lawful tenant of the premises in question and as such is entitled to the full, free and undisturbed occupation thereof, and (Par. 3) that defendant is a trespasser on the said premises and despite demands fails and refuses to remove therefrom.

Defendant was summoned to appear before the Court on 21st November, 1947. On that date defendant was ordered to file a plea within 14 days and the case was set down for trial on 29th January, 1948. In a plea, dated 25th November, 1947, the allegations in paragraphs 2 and 3 of the summons are denied.

Owing to the illness of Mr. Sutton (defendant's attorney) his clerk on 28th January, 1948, after consulting plaintiff's attorney, arranged for the postponement of the case. The Native Commissioner on the same day wrote to Mr. Sutton that the case had been set down for 3rd February, 1948. It appears from the record that on this day Mr. Sutton was in Court in connection with another matter when this case was called. He expressed surprise and said that he was not aware that the case was set down for that day. He informed the Court that defendant was not present and that he was not ready to go on with the case as his papers were in his office. In elaboration of his defence he stated that his client was not in occupation of the premises at all. He applied for a postponement and tendered costs of the day. Plaintiff's attorney would not agree to a postponement and stated that his instructions were to proceed with the case forthwith. Mr. Sutton then stated that if the case proceeded he would withdraw. The Native Commissioner thereupon warned him that in that case default judgment would be granted if applied for. Mr. Sutton then, and before a decision on the application for postponement was given, withdrew from the case, and on application an order of ejectment against defendant was granted with costs.

On the same day notice of application to reopen the case was given and in the supporting affidavits Mr. Sutton and his clerk declared that they were not aware that the case had been set down for trial on 3rd February, 1948, and defendant declared that she attended Court on 29th January, 1948, and was informed that her attorney was ill, that she would be advised of the date of hearing, that she was not so advised and that she had a good defence since she, with the knowledge and permission of plaintiff, hired the premises from the land-lady about May, 1948 (it should be May, 1947), when plaintiff left Cape Town.

The application came before the Court on 6th February, 1948, when it was opposed mainly on the ground that Mr. Sutton, having withdrawn from the case, had acquiesced in the judgment and consequently re-opening was barred at Common Law, reliance being placed on the decision in Hlatshwayo *v.* Mare and Deas (1912 A.D. at page 242).

Two questions come up for decision namely (1) was defendant in wilful default and if not, (2) whether she has a good defence.

It is clear from defendant's affidavit that she herself was not in wilful default, but it is contended that her attorney was. In terms of rule 30 (1) of Government Notice No. 2253 of 1928, the Court may rescind any judgment granted in the absence of the party against whom the judgment was given. " Party " is defined as including his representative. It is unnecessary to decide whether the party will always be bound by the default of his attorney. We shall assume for the purpose of this case that, if Mr. Sutton's default was wilful the application for rescission should be refused.

Now at the time Mr. Sutton left the Court both attorneys were under the erroneous impression that the Native Commissioner had refused the application for postponement. Bearing this in mind Mr. Sutton had the choice of either remaining in Court and, at the close of plaintiff's case, renewing his application for postponement and if it were then refused, lodging an appeal; or, he could have withdrawn from the case. The former choice would have entailed greater expense and much delay, and besides he was not in a position to conduct the case as he did not have his brief with him. It seems to me, therefore, that in the circumstances he acted correctly in withdrawing from the case. It was his duty to protect the interests of client and, being without his brief, he was not in a position to represent his client adequately. Such withdrawal cannot, in the circumstances of the case, be regarded as a reckless unconcern whether or not judgment would be given against his client, much less that he acquiesced in the judgment. [Gxaleka *v.* Mabomle, 1945 N.A.C. (C. & O.) 67].

It is further contended that as Mr. Sutton was advised in writing of the date of the trial by the Native Commissioner, his inability to proceed with the case was due to his own negligence. His position was that he had been ill. He returned to his office on 2nd February, to find a pile of correspondence requiring his attention. We are entitled to assume that the notification from the Native Commissioner was received in Mr. Sutton's office, but even so, both he and his clerk swear that they had not seen it, and Mr. Sutton's attitude in Court on 3rd February clearly indicates that he had not seen the letter. In these circumstances it cannot be said that the omission of defendant's attorney to read through all his correspondence amounted to negligence so gross that his default in Court must be regarded as wilful.

I turn now to the question whether defendant has a good defence.

The plea filed is a bare denial. In terms of Rule 26 (*a*) a defendant is required to answer the plaintiff's claim. A bare denial is not such an answer to a claim for an order of ejectment. The rule contemplates that the defendant should state why an order in terms of plaintiff's claim should not be granted. The particulars lacking in the plea were supplied by Mr. Sutton on 3rd February, 1948, when he informed the Court that his client was not in occupation of the premises at all, and by defendant herself in her affidavit that she had hired the premises from the owner with plaintiff's knowledge and permission when the latter left Cape Town.

Here we have two defences each good standing by itself, but taken together mutually destructive. It is, however, clear that Mr. Sutton was taken by surprise when he found that the Native Commissioner was ready to proceed with the case there and then. He did not have his papers with him. He was obviously speaking from memory when he stated that defendant was not in occupation of the premises at all. As it turned out his memory had failed him. This defence was therefore pleaded in error, and that leaves us with the second defence which, if established, is a complete answer to plaintiff's claim, and the application for rescission of the default judgment should, in the circumstances, have been granted.

The appeal is consequently allowed with costs, the default judgment granted on the 3rd February, 1948, is rescinded and set aside and the record of proceedings is returned to the Court below for trial. Appellant is ordered to pay wasted costs in the Court below, the costs of the application to abide the final determination of the case.

For Appellant: Mr. Barnes, Kingwilliamstown.

For Respondent: Adv. Beinart instructed by Gurland, Beinart & Co., Cape Town.

CASE No. 15.

LUNGELA BEJA *v.* THOMAS MATIKA.

KINGWILLIAMSTOWN. 14th July, 1948. Before Sleigh (President), Pike and de Souza, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Tresspass—Unlawful impounding of stock—Dolus *not lightly inferred*—Onus *on defendant discharged—Entitled to full judgment—Costs—Increased fee for conducting case refused.*

Appeal from the Native Commissioner's Court, Port Elizabeth.

Sleigh (President) delivering the judgement of the Court:

In this action plaintiff claims that he has suffered £30 damages "through the wrongful and unlawful seizure by defendant of certain donkeys the property of plaintiff on three occasions during the period August to September 1947, and through the defendant wrongfully and unlawfully impounding the said animals".

Defendant in his plea admits the impounding but denies that he acted wrongfully and unlawfully. He avers that the donkeys had trespassed upon his lands and damaged his crops.

The Assistant Native Commissioner ruled that the *onus* was upon plaintiff to prove the amount of damage suffered, and upon defendant to prove that the impounding was lawful. After hearing evidence the Native Commissioner found that the impounding was unlawful and entered judgment for plaintiff for £5. 13s. 6d. being the actual amount paid by plaintiff to the pound master to release the animals. He states in his reasons that the action falls within the principles of the *lex Aquilia* and not the *actio injuriarum*, that specific damages must therefore be proved, that he was not satisfied that this wrong constituted an impairment of plaintiff's dignity or reputation, and further, that there was no evidence to this effect.

Against this judgement plaintiff has appealed purely on the legal ground that he was entitled to sentimental damages.

Defendant has cross-appealed on the grounds that the Native Commissioner erred in holding that the *onus* was upon defendant to prove that the impounding was lawful, and that in any event defendant had discharged this onus.

At the hearing of the appeal it was decided to hear argument on the cross-appeal first. Miss Egan, counsel for defendant, at the outset abandoned the first ground of appeal, namely, that the burden of proving that the impounding was lawful was incorrectly placed on defendant. She confined her arguments to the facts of the case.

Now, even if the *onus* were, in the first instance, upon defendant (cf. the parallel case of Union Government *v.* Sykes 1913, A.D. 156) that onus was discharged by the unrebutted evidence that the donkeys actually were in defendant's land. The burden of proof was then shifted to plaintiff to prove that defendant himself had taken the donkeys from a place where they had a right to be and had driven them on to his own land. Before discussing the evidence upon which plaintiff relies to prove this, it is necessary to set out briefly the geographical position of defendant's land in relation to other lands and the commonage in the vicinity, and other facts which are common cause.

The recorded evidence is disjointed and difficult to follow, but it appears that defendant is the owner of a five morgen plot at Missionvale in the District of Port Elizabeth. The plot is fully fenced and is divided into two parts by an internal fence. Defendant occupies one part on which peas were growing at the time of the alleged trespass. The other part is leased by plaintiff who has a house—his own property—on it. There are a number of other plots owned by natives and coloureds between defendant's garden and the commonage, upon which the plot owners are entitled to graze their stock. Plaintiff is the owner of eight donkeys and they graze unattended with donkeys belonging to other owners on the commonage.

Now plaintiff states that the donkeys could not have trespassed on defendant's land, firstly because it was fenced and the donkeys could not break through the fence, and secondly because there are five other lands, some of which are not fenced, between defendant's land and the commonage and there were no complaints that the donkeys had trespassed on the unfenced lands,

In regard to the second submission there is no evidence that any crops were growing on the unfenced lands but, even if there were, it does not necessarily follow that, because there were no complaints, the donkeys had not trespassed on these lands.

The weight of the first contention depends upon the state of repair of defendant's fence. Plaintiff himself says that the fence is weak but too strong for the donkeys to break through. He left it to the Native Commissioner to infer that the donkeys had been driven in through the gate. Defendant states that on all three occasions plaintiff's donkeys trespassed on his land at night time after having broken in from the adjoining land belonging to Langs, his witness. He states further that he kept the donkeys in his kraal until the following morning when he sent for plaintiff, but as the latter did not appear, he sent them to the pound.

Langs, says that Plaintiff's donkeys had trespassed in his peas in August 1947, but that on the three occasions when they trespassed on defendant's land they did not go into his peas. He says that he did not see the animals in defendant's garden but examined the spoors and that the donkeys on these occasions came from the commonage side over unfenced lands, through his gate which was open, thence along a footpath and then broke through the dividing fence into defendant's garden.

It is contended that it is most improbable that the animals, of their own accord, would have left the donkeys of other owners on the commonage, entered Langs' land, passed his peas in which they had trespassed before and broken through a fence to get at defendant's peas. This contention would be sound if the fence in question was in good repair, but plaintiff has brought no evidence to support his testimony that the donkeys could not break through the fence. He had the opportunity of inspecting the place where the animals are alleged to have broken through. He did not do so and he cannot therefore now deny that the animals did in fact break through the fence. Moreover he paid the pound fees for the first trespass without demur and this tends to show that he knew that the fence was not stock-proof.

Plaintiff's independent witness, Reuben, states that on an occasion he saw defendant driving plaintiff's donkeys through a gate into a land where plaintiff lives. The latter admits that the donkeys were not impounded on this occasion. I am prepared to accept this evidence but it does not rebut the evidence that the animals did in fact trespass on the other occasions.

It is common cause that defendant desired to purchase plaintiff's house for £36, and that the latter refused to sell at this price. Plaintiff asks the Court to infer that because of this defendant resorted to the unlawful impounding to compel plaintiff to sell the house and vacate the premises. Reuben's evidence, coupled with the admitted fact that defendant sued plaintiff for ejectment on a false allegation that the rent was in arear, indicates that defendant would not hesitate to adopt unlawful means to attain his object. *Dolus* is however not lightly inferred. Plaintiff must lay a solid foundation before he can ask the Court to infer that defendant had himself driven the animals into his own land. There is no such foundation. We are in the dark as to the state of defendant's fence. This point was not cleared up and we would not be justified in drawing the inference that the animals were deliberately driven by defendant into his own land.

At the commencement of the trial plaintiff's attorney obtained a ruling from the Court that the *onus* was on defendant to prove that the impounding was lawful. We have come to the conclusion that that *onus* has been discharged. There is therefore no ground for refusing him a full judgment. The cross-appeal consequently succeeds and it follows that the appeal on the question of law falls away and must be dismissed.

Counsel for appellant has applied to the Court for an increased fee for conducting the appeal. The most difficult aspect of the case is the question of *onus,* but this ground of appeal was abandoned. The legal question of damages raised in the appeal is a comparatively simple one (see McKerron on Delicts 3rd Ed. page 255, Edwards *v.* Hyde, 1903 T.S. 381, Klopper *v.* Mazako, 1930 T.P.D. 860, Stuurman *v.* Van Rooyen 10 S.C. 35 and Theron *v.* Steenkamp 1928 C.P.D. at p. 434). The record consists of only 9 pages of evidence and the facts are not involved. In the circumstances there are no adequate grounds for increasing the fee. The application is consequently refused.

The cross-appeal is allowed with costs and the judgment of the Court below is altered to one for defendant with costs. The appeal falls away and is dismissed with costs.

For Appellant and Cross-respondent: Mr. Stanford, Kingwilliamstown.

For Respondent and Cross-appellent: Adv. Egan as instructed by Mr. J. H. Spilkin, Attorney-at-law, Port Elizabeth.

CASE No. 16.

BASOP SALMANI *v.* NOWINGJINI SALMANI AND ANO.

KINGWILLIAMSTOWN: 15th July, 1948. Before Sleigh (President), Pike and de Souza, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Estate—Eldest son in Right Hand House succeeds to property of Great House, if no male issue in that house—Facts at variance with Native Custom must be conclusively proved—Institution of an heir is a public act.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President) delivering the judgment of the Court:

Plaintiff is the eldest son and second defendant is the second son of first defendant who was the Right Hand wife of the late Bobotyana Salmani. There is no male issue in Bobotyana's Great House, and plaintiff who claims to be the heir in that House, alleges that while he was in Cape Town the defendants wrongfully and unlawfully caused the stock belonging to his father's estate to be transferred in the dipping registers from the name of the great wife who had died, to the name of 2nd defendant. Plaintiff claims to be the owner of the cattle and prays for an order directing the dipping foreman to transfer the cattle into his name.

The defence is a denial that plaintiff is the heir of Bobotyana. It is alleged that plaintiff " was adopted to the House " of Siya, the brother of Bobotyana, and that second defendant " was adopted to the Great House " of Bobotyana. Second defendant claims that he is entitled to have the stock registered in his name.

The Assistant Native Commissioner dismissed the summons and plaintiff has appealed.

In the absence of male issue in the Great Houses and in the Houses allied to the Great House, the eldest son in the Right-hand House succeeds to the Great House property. The onus was therefore correctly placed upon the defendants to prove the institution of second defendant as the heir of Bobotyana.

It is common cause that Siya died without leaving male issue. Defendants state that after his death Bobotyana placed plaintiff in Siya's House and second defendant in his (Bobotyana's) Great House. This evidence is denied by plaintiff and his denial is supported by the fact that Bobotyana who claimed to be Siya's heir renounced his right to the latter's land. If plaintiff had been placed in Siya's hut before Bobotyana renounced his right to the land the latter would have said so.

It is clearly established in the evidence that plaintiff was placed at Siya's kraal. There is nothing unusual in this. Indeed it is the recognised practice to place a son or near relative at the kraal of a deceased to look after the affairs of that kraal on behalf of the heir who has his own kraal. Plaintiff, however, does not forfeit his right to Bobotyana's property by being placed at Siya's kraal.

The real issue in this case is whether second defendant was instituted heir of Bobotyana's Great House. The defendants state that plaintiff was disinherited by his father. A father is not entitled to disinherit his son unless he has good grounds for doing so (see Nohele *v.* Nohele, 6 N.A.C. 19). Bobotyana had no such grounds and it is very improbable that he did disinherit plaintiff as the latter was a minor at the time. Moreover, if plaintiff had been disinherited his father would have had no right to claim the crops reaped by him. This is what first defendant says her husband did.

It has been repeatedly held in this Court that where a party in an action alleges facts which are at variance with normal Native custom, such facts must be proved by strong and convincing evidence. The evidence of defendants stands alone and is singularly unconvincing. The fact that plaintiff lives at Siya's kraal does not prove that second defendant was appointed Bobotyana's heir.

The institution of an heir in an heirless House is a public act which requires much formality. The relatives, even of a distant degree, and neighbours are assembled, a formal declaration made and the Chief is notified. (See Zondani *v.* Dayman, 2 N.A.C. 132). Now Jennett Nama, Elias Mbile, Gova Myakayi and Hotshele are alleged to have been present when second defendant was appointed heir. These men are apparently alive and available. None of them has been called and there is no explanation for this omission. This leads naturally to the inference that they cannot or will not support the evidence for the defence [see Elgin Fireclays, Ltd. *v.* Webb, 1947 (4) S.A.L.R. at page 749].

We come therefore to the conclusion that second defendant has failed to prove his appointment as the heir of Bobotyana's Great House.

This does not, however, dispose of the appeal because plaintiff would be entitled to have the thirteen cattle in question registered in his name only if they are his property.

Now it appears from the testimony of the defendants who gave their evidence before the plaintiff, that Bobotyana apportioned his daughters to his sons. Defendants state that of the thirteen cattle eight are the dowry of a daughter allotted to second defendant, three are the dowry of a daughter allotted to Mzinga, a younger brother of plaintiff, and that the other two form part of the dowry paid for Noncodo who had been allotted to plaintiff, but that these two cattle were given to second defendant who provided the girl's marriage outfit. Apart from a denial in the plea of plaintiff's allegation in the summons that he is the owner of these cattle these facts were not specially pleaded and they are not disputed by plaintiff in his evidence, due no doubt, to the fact that the issue in the Court below had resolved itself into the question as to whether or not second defendant had been instituted as heir of the Great House. The issue as to the allotment of the daughters was not investigated and we are therefore unable to say that plaintiff has established that he is the owner of the thirteen cattle.

There is a further difficulty that in the summons plaintiff asks for the transfer of the cattle into his name, whereas in his evidence he asks for the transfer of the cattle into first defendant's name. If this latter request were granted plaintiff would be in no better a position than he is now because first defendant would then be able to retransfer the cattle to second defendant if she so wished.

Finally plaintiff seeks an order against the Dipping Foreman who is not before the Court.

The appeal is dismissed with costs.

For Appellant: Mr. Kelly.

For Respondent: In default.

CASE No. 17.

MPAYIPELI NXALA *v.* XALISILE YAKOPI.

KINGWILLIAMSTOWN: 15th July, 1948. Before Sleigh (President), Pike and de Souza, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Warrant of execution—Judgment—Return of wife before a fixed date or return of dowry—Meaning of non-return of wife before fixed date dissolves customary union—Husband entitled to enforce alternative part of judgment.

Appeal from the Court of the Native Commissioner, Lady Frere.

Pike (Member) delivering the judgment of the Court:

On the 25th September, 1947 appellant obtained the following judgment in the Magistrate's Court, Lady Frere.

"For the return of his customary wife, Nofezile, on or before 1st October, 1947, otherwise the return of 7 head of cattle and costs hereof amounting to £3. 15s. 3d. Plaintiff is declared a necessary witness." On the 15th October, 1947, appellant issued a warrant of execution. This warrant is not attached to the record, as it ought to have been. On the 18th December, 1947, respondent filed the following affidavit with the Clerk of the Court:—

1. "On the 25th day of September, 1947, Plaintiff obtained judgment against applicant in the above action and that applicant was ordered to deliver to plaintiff his wife Nofezile on or before the 1st day of October, 1947, failing which applicant had to return to plaintiff the seven head of dowry cattle.
2. On the 30th September, 1947, applicant duly delivered Nofezile to plaintiff and left her at his kraal.
3. Nofezile subsequently again left plaintiff and returned to applicant's kraal informing applicant that plaintiff had made it impossible for her to remain there and had also told her that he did not want her but wanted the cattle.

4. On the 21st November, 1947, Nofezile was again offered to Plaintiff at Lady Frere but he refused to accept her.
5. Subsequent to this applicant together with the son of the headman took Nofezile to plaintiff's kraal but he refused to accept her stating that he wanted the cattle and not the wife.
6. That plaintiff issued a warrant of execution against applicant for the delivery of seven head of cattle and 6s. 3d. on the 15th day of October, 1947, and that the cattle were in terms thereof attached by the messenger of the Court on the 10th day of December, 1947.
7. That applicant maintains that he acted in accordance with the order of Court and that he can therefore not be compelled to also deliver the cattle to plaintiff.

Therefore applicant prays that the Court may be pleased to grant an order:—

1. Setting aside the warrant of execution issued on the 15th October, 1947.
2. Instructing the Messenger of the Court to release the cattle attached and returning them to applicant.
3. Restraining plaintiff from re-instituting a claim for the return of the dowry cattle."

There is no evidence on record to show that this affidavit was served upon appellant or his attorney. However on the 4th February, 1948 the application contained in the affidavit was heard by the Native Commissioner, both appellant and respondent being legally represented. Appellant's attorney objected that the matter was not properly before the Court and argued that the proper procedure was by way of summons relying upon the decision of Wilson Ntshaba and E. Sipuka *v.* the Ethiopian Catholic Church in Christ (1938 N.A.C. T. & N. 233).

The Native Commissioner did not give a decision on this objection but held "That the warrant of execution did not comply strictly with the judgment because it contained only the latter portion of the judgment." and he granted the application with costs in so far as items 1 and 2 are concerned.

Against this judgment an appeal has been noted on the following grounds:—

1. That the judgment is bad in law in that the Court erred in holding that it was necessary for plaintiff to insert in his writ an order for the return of his wife.
2. That the Native Commissioner erred in not calling upon the Defendant (Applicant) to adduce evidence vive voce in support of the allegations contained in his affidavit.
3. That the Native Commissioner erred in not affording plaintiff an opportunity of adducing evidence vive voce to refute the allegations contained in defendant's affidavit.

The Native Commissioner relies upon the decision in Cornforth *v.* Dalton and Roux (43 N.L.R. 116) in which it was held that where the judgment was for the delivery of certain shares or failing such delivery for judgment of a certain sum of money and the writ was for the money only, the judgment creditor had no right to select the latter part of the judgment as the part to be enforced. That decision is not in point. There the Messenger could attach the shares. In the present case the woman cannot be attached. The correct meaning of the judgment of the 25th September, 1947 is that respondent was required to deliver Nofezile to her husband on or before the 1st October and if he failed to do so the customary union between appellant and Nofezile must be regarded as disolved and respondent would be obliged to refund the dowry.

If Nofezile was not returned to appellant by the 1st October, he was entitled to issue a writ forthwith for the seven cattle only.

The question as to the correct procedure to be adopted in a matter of this nature did not form the subject of appeal to this Court and therefore does not call for decision. It is to be pointed out, however, that the application is headed "In the Native Commissioner's Court, Lady Frere," but is directed "To the Magistrate of the above Honourable Court". There is no provision in law for a Magistrate to preside over a Court of Native Commissioner.

The appeal is allowed with costs and the order by the Court below setting aside the warrant of execution and instructing the Messenger to release the cattle attached and to return them to applicant is set aside with costs. The record of proceedings is returned to the Court below for such further action as applicant may be advised to take.

For Appellant: Mr. Kelly, Lady Frere.

For Respondent: In default.

CASE No. 18.

TOM MAZAKA *v.* GILBERT FATYELA.

KINGWILLIAMSTOWN: 15th July, 1948. Before Sleigh (President), Pike and de Souza, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Surveyed Land (Ciskei)—Estate Regulations—Enquiry under G.N. 1664 *of* 1929*—Tables of Succession (G.N.* 2257 *of* 1928*)—No surviving male descendants of grandfather of registered holder—Land reverts to S.A.N. Trust—Costs on Appeal—Legal point raised* mero motu*—No order as to costs.*

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President) delivering the judgment of the Court:

Garden Lot No. 3, Block " G ", situate in Zwartwater Location, district of Glen Grey, is registered in the name of Zamani Mbayishe who died without male issue. There are two claimants for the lot, namely Tom Mazaka (now appellant) and Gilbert Fatyela (now respondent).

It is common cause that Zamani was the son of Yani, the son of Mbayishe, the son of Noka who was the daughter of Lutoyi. Appellant claims the land on the ground that he is the son of Pindeni, the son of Ngqongoya the son of Hanise by his wife Maqinebe. Apellant avers that Hanise married Noka and therefore her son Mbayishe is Hanise's legitimate issue. Respondent admits that by repute Hanise was the natural father of Mbayishe but states that the latter was illegitimate. He claims the land on the ground that he is the son of Joseph, the son of Mbekwane, the son of Fatyela, the son of Lutoyi who was entitled to the illegitimate offspring of his unmarried daughter Noka.

In an enquiry in terms of section 3 (3) of Government Notice No. 1664 of 1929, the Acting Assistant Native Commissioner found against appellant and ruled that respondent is entitled to the land in question. This decision is attacked on appeal on the ground that it is against the weight of evidence.

The evidence on both sides is largely hearsay. It is conflicting and does not carry the case far. The fact that Mbayishe had appellant's family name, Mazaka, supports appellant's evidence that Hanise was married to Noka. On the other hand the fact that Noka was never given a married name supports the evidence for respondent.

It is, however, unnecessary to decide which of these two contentions is correct. The land in question falls within the purview of section 23 (2) of Act No. 38 of 1927, and must devolve in terms of the tables of succession. These tables for the Cape Province, excluding the Transkei, are prescribed in Government Notice No. 2257 of 1928. The Tables (see clause 8) go no further in the ascending line than the grandfather of the deceased registered holder, i.e. Mbayishe, and since it is common cause that he has no surviving male descendants through males, the land in question reverts to the South African Native Trust in terms of clause 9 and must be dealt with as provided in section 6, Part II, of Government Notice No. 2257 of 1928. In the absence of any descendants the provisions of section 18 (2) of Act No. 18 of 1936, appear to apply.

The steps taken by the appellant have resulted in the setting aside of the Native Commissioner's finding. The appeal must therefore be allowed, but as the ground for this Court's decision was raised *mero motu* and not in the notice of appeal there will be no order as to costs.

The appeal is allowed and the finding of the Native Commissioner is altered to read " That the land shall revert to the South African Native Trust."

For Appellant: Mr. Kelly, Lady Frere.

For Respondent: In default.